No. 90-597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT and ANA C.,

Petitioners,

vs.

MIGUEL T. and LOUISE N.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners Robert and Ana C. respectfully submit this reply Brief in further support of their Petition for a Writ of Certiorari. The purpose of this Brief is to address certain allegations made by Respondents Miguel T. and Louise N. in their opposition brief. ("Resp. Br.").

THE JURISDICTION OF THIS COURT

Respondents suggest that the Court of Appeals below, in the wake of its invalidation of Domestic Relations Law, §111 (1) (e), constructed a new *federal* criteria for measuring whether Respondent Miguel T. has the right to veto this adoption. From

this premise, Respondents argue that the order below is not final. Respondents are mistaken.

The Court of Appeals wrote that the task of "[e]stablishing a proper substitute is of course the prerogative of the Legislature, not the courts." (A-18). Because of the need to decide cases pending action by the Legislature, the Court of Appeals constructed an interim standard, which it recognized might ultimately be displaced by different legislative criteria. Indeed, the Court of Appeals took pains to "underscore that we are not prescribing necessary or even appropriate elements for any new statute, or speculating as to its constitutionality." (A-18, 76 N.Y.2d 387, 407-408, 559 N.Y.S.2d at 864-865).

Manifestly, the new standard is a matter of state law and was viewed as such by the Court of Appeals. The interim standard is to govern in New York pending action by the New York State Legislature; state legislatures write state law. That the Court of Appeals professed, in writing a new state standard, to be "guided by principles gleaned" from this Court's prior decisions does not transmute the question into one of federal law.

As the Law Guardian demonstrated in his Brief, the several states have taken varied approaches in writing legislation in response to this Court's decision in *Caban v. Mohammed*, 441 U.S. 380 (1979) and *Lehr v. Robertson*, 463 U.S. 248 (1983). That such legislation was drafted in response to this Court's interpretations of federal constitutional questions does not convert each individual application of statute to facts into a federal case. The federal issue is whether the governing state statute comports with the federal Constitution. That question was raised in this case and has been finally decided by the Court of Appeals.

Respondents argue that Petitioners, as New Hampshire residents, have no interest in whether governing New York law has been correctly held unconstitutional. Yet, Petitioners, at the earliest stage of the matter, agreed to the application of New York law and, indeed, withdrew proceedings in New Hampshire

in deference to New York courts[1] and New York law.[2] As the Law Guardian notes in his Brief (p.ii), the Attorney General of New York has relied upon Petitioners' advocacy of the constitutionality of the statute. In any event, Petitioners undeniably have an interest in the proper construction and application of the federal Constitution. Respondents' contention that Petitioners "are hardly in a position to claim hardship if this Court declines review" (Resp. Br., p. 6) is strained. Petitioners, based on the error of the Court below, stand to lose their daughter — a child who they, and they alone, have raised for the past two and one-half years. It is their family that stands to be destroyed by force of error of law.[3]

The decision of the Court of Appeals below has ramifications beyond this single case. It directly impacts upon thousands of adoptions in New York State alone. As Associate Dean Joan Wexler of Brooklyn Law School reported on the day of the decision: "What we now have is an opportunity for chaos." Kolbert,

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[1] At no time did Petitioners ever object to the jurisdiction of the New York courts. In the *habeas corpus* proceeding referred to by Respondents (Resp. Br., p.5 n.3), Petitioners were never served with any papers. Papers were served upon a New Hampshire attorney and it was the attorney who objected to jurisdiction over him.

[2] The record is clear that the New Hampshire proceedings were withdrawn voluntarily. The New Hampshire court did not dismiss the proceedings; indeed the New Hampshire court had scheduled several days of hearings.

[3] Respondents carefully refrain from advising this Court that, on the eve of the Court of Appeals' decision, they fought and separated. Respondent Louise N. filed charges against Miguel T.; Respondents have not disclosed the disposition of such proceedings.

Louise N. was properly referred to by her pre-marriage name in the caption herein since: (a) she signed the adoption papers in that name; (b) she was identified in the adoption petition by that name; (c) she was referred to in the trial court's opinion by that name; and (d) her brief, violent marriage has all but terminated.

Moreover, even the Court of Appeals agreed that the "marriage" was irrelevant to these proceedings — a holding that Miguel T. has not attempted to challenge by cross-petition.

"Fathers' Rights On Adoption Are Expanded", *New York Times*, July 11, 1990, at B1, B4. That chaos can be avoided only by this Court's review of the matter; the Court of Appeals has finally determined the statute's unconstitutionality and will not consider that point again. Additionally, as the Law Guardian has written in his Brief, the decision below will also be influential in courts in other states as well.

It is suggested that the decision below will render it unsafe for attorneys to "blink at the unwed father's rights". (Resp. Br., p. 6). The Court of Appeals likewise contended below that the statute "can easily be used to block the father's rights". (A-15, 76 N.Y.2d at 405-406, 559 N.Y.S.2d at 863). These assertions beg the real question: what are the unwed father's "rights" as respects a newborn placed for adoption? That question has never been considered by this Court and merits review.

REPLY STATEMENT OF THE CASE

Respondents rely exclusively upon the statement of facts set forth in the opinion of the trial Court. It is asserted that the trial Court's factual findings "were not disturbed on appeal, either in the Appellate Division or in the Court of Appeals" (Resp. Br., p. 7). That claim is erroneous.

The Court of Appeals relied upon the facts as found by the Appellate Division, stating that the facts "have been developed at length elsewhere" and citing to the Appellate Division decision below. (A-3; 76 N.Y.2d at 394, 559 N.Y.S.2d at 856). The Appellate Division, in turn, found only that the Family Court had "accurately characterized" the natural parents' relationship as "turbulent, marred by mutual suspicion as well as assaultive behavior on the natural father's part, and neither normal nor stable. (A-24; 150 A.D.2d at 26, 545 N.Y.S.2d at 381). It rejected the other factual findings made by the Family Court. The appellate Division stated that: "Turning to the facts of the instant case, we conclude, *contrary to the findings of the Family Court*, that the natural father has fallen far short of demonstrating that he took meaningful steps to establish a family unit." (A-27; 150 A.D.2d at 28; 545 N.Y.S.2d at 382) (Emphasis added). Moreover,

a comparison of the opinions reflects that the Appellate Division stated facts not set forth in the Family Court opinion and did not adopt "facts" stated in the Family Court opinion.[4]

Respondents claim that the rape reported by Louise N. should be disregarded by this Court, since the Court of Appeals made no reference to it. (Resp. Br., p. 13, n.5). Yet, the fact is that the rape was duly noted by the Appellate Division. The Court of Appeals disregarded it, for purposes of its constitutional analysis, in the belief that the relationship between unwed father and unwed mother is constitutionally irrelevant (A-15; 76 N.Y.2d at 405, 559 N.Y.S.2d at 863).

The claim that Miguel T.'s parental fitness has not been questioned is bizarre, given the undisputed facts of the case as well as the legal context. Miguel T. wishes to block this adoption by obtaining an adjudication that he should have an absolute veto right — a veto right which would cut-off and prevent any consideration of his parental fitness. The Family Court bifurcated the hearing, limited the issue to the claim for veto rights, and refused to consider "best interests" or fitness evidence, a course of procedure found improper by the Appellate Division. (A-29; 545 N.Y.S.2d at 383-384).[5]

REASONS FOR GRANTING THE WRIT

Respondents argue that the writ should be denied because the governing constitutional issues are "well-defined" and it is "too late in the day" to apply Justice Scalia's analysis, as articulated in *Michael H. v. Gerald D.*, ____ U.S. ____, 109 S.Ct.

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[4] For example, the Appellate Division referred to the infidelity of Miguel T., the abortion procured by the biological mother, the rape as to this pregnancy, and Miguel T.'s fears of the biological mother. (A-22, A-23). None of these matters were addressed in the Family Court opinion. On the other hand, much of the "facts" set forth in the Family Court opinion were not referred to by the Appellate Division and were rejected by that Court.

[5] Such evidence was received during the suspended hearing held after the Appellate Division remand.

2333 (1989). That argument must surely be surprising to Justice Scalia and to the three other members of the Court who concurred with him. It must also be surprising to Justice Stevens who, in his concurrence in *Michael H.*, acknowledges the importance of "enduring family relationships" 109 S. Ct. at 2347.

Respondents' claim that their relationship should be treated as "a protected family unit under the historic practices of our society" (Resp. Br., p. 12) is both factually untenable and, more important, off the legal mark. Surely, our society does not afford protection to a relationship so permeated with violence and disrespect for law.[6] And the issue here is not whether, on the facts, Respondents had a "family unit"[7]. The issue is whether a six month cohabitation period is an appropriate and permissible means for determining, for purposes of the adoption of newborns, whether the unwed father had formed a "protected family unit". The Court of Appeals below explicitly held the absence of a family unit is unimportant since unwed fathers should be recognized as possessing inchoate opportunity interests, despite the absence of any meaningful relationship with mother or child. (A-12, A-13, 76 N.Y.2d at 404, 559 N.Y.S.2d at 862).

Respondents' contention that the law is "well settled" is belied by the Court of Appeals' acknowledgment that it was addressing an "open question" (A-11; 76 N.Y.2d at 401-402, 559 N.Y.S.2d at 861).

The argument that Miguel T.'s participation at a best interest hearing is not sufficient because he lacks substantive rights at such hearing is unavailing. (See Resp. Br., p. 16, n. 6). Respondents have grossly misrepresented New York law to this Court. *Matter of Male F.*, 97 Misc.2d 505, 411 N.Y.S.2d 982

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[6] Respondents each have separately requested, on numerous occasions, judicial assistance to protect each from the abuse of the other.

[7] Miguel T. testified below that, as late as November 1988, months after placement, there was no intact family. (Law Guardian Br., p. 8). The Appellate Division termed Miguel T.'s efforts to establish a substantial family unit "woefully inadequate". (A-27).

(Surrogate's Court Bronx County 1978), cited by Respondents, involved the form of notice to be given the unwed father. The court granted an application by adoptive parents for permission to omit their names and addresses from the process to be served on the natural father. The court held that *process* could fall into the wrong hands and the privacy interests of adoptive parents and children warranted omitting names and addresses, provided that sufficient information was provided to allow the unwed father to make a considered judgment as to whether or not he should appear in the proceeding. 411 N.Y.S.2d at 987-988.[8] The court pointedly observed that the unwed father would obtain more information once he elected to appear. 411 N.Y.S.2d at 988.[9]

Male F. expressly confirms that those fathers who are entitled to notice are given full right to participate at a best interest hearing. As the court stated: "Naturally flowing from a right to notice is the right of a putative father to be heard, if he wishes, on the subject of the disposition of his children before a final determination is reached which can affect his relationship, if any, with the child." 411 N.Y.S.2d at 986.[10] Miguel T. is not entitled under this Court's prior precedents to the invalidation of a statutory scheme which protects the interests of viable family units, particularly where his "rights" have been protected through his participation at a best interests inquiry.

As shown in the Petition and in the Law Guardian's Brief, there are compelling reasons for this Court to grant the writ and review the determination of the Court of Appeals.

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[8] The court held that process should disclose the age of the adoptive parents, their marital history, religious faith, occupations, annual income, manner of obtaining custody, etc. 411 N.Y.S.2d at 987.

[9] In this matter, Miguel T. was provided with all required information (including the names and addresses of Petitioners).

[10] Examination of the record of the now-suspended hearing after remand will confirm the extensive participation of Miguel T., by his attorney, on all issues.

CONCLUSION

The petition for a writ of certiorari should be granted.

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November 15, 1990

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